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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ROBERT H. HOPKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

What is the meaning of the term "knowing" as used in the Clean Water Act in 33 U.S.C. section 1319(c)(4) and section 1319(c)(2)(A)?

What is the mens rea required for a conviction under 33 U.S.C. section 1319(c)(4) and section 1319(c)(2)(A) and conspiracy to violate the same provisions in violation of the same provisions and 18 U.S.C. section 371?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered July 18, 1995.

REFERENCE TO OPINIONS BY OTHER COURTS

The case below was reported by the United States Court of Appeals for the Second Circuit in the case of *United States of America v. Robert H. Hopkins*, No. 94-1428 (April 28, 1995).

BASIS FOR THE JURISDICTION OF THIS COURT

The judgment in this case was entered on April 28, 1995, by the United States Court of Appeals for the Second Circuit.

The order denying the petition for rehearing was entered on July 18, 1995.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

18 U.S.C. section 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency

thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

33 U.S.C. section 1319(c):

(c) Criminal penalties

(1) Negligent violations

Any person who –

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or other than in compliance with all applicable Federal, State, or local requirements or permits which causes such

treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who –

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such

treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General Rule

Any person who knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Administrator or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of this subparagraph (A) of this paragraph –

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death of serious bodily injury –

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant; except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of –

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent; and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or

organized for any purpose, and such term include a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(d) Civil penalties; factors considered in determining amount.

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued

under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available –

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition of limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

> (B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

33 U.S.C. section 1362(6):

> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

STATEMENT OF THE CASE

The petitioner in this case was the defendant in a criminal prosecution initiated in the United States District

Court for the District of Connecticut for violations of the Clean Water Act. Federal jurisdiction was based on the Clean Water Act. Specifically, the defendant was convicted of one count of falsifying, tampering with, or rendering inaccurate a monitoring device or method required to be maintained pursuant to the Clean Water Act, 33 U.S.C. section 1319(c)(4), one count of violating the the terms of a discharge permit in violation of 33 U.S.C. section 1319(c)(2)(A), and one count of conspiracy to violate the above two provisions of the Clean Water Act in violation of 18 U.S.C. section 371.

From 1987 through September 6, 1990, the defendant was the vice president of manufacturing of Spirol International Corporation ("Spirol"). Spirol had a manufacturing process that discharged wastewater into the Five Mile River. It did so pursuant to a permit which regulated, among other matters, the level of zinc which was discharged. The instant indictment alleged that for approximately an 18 month period from March, 1989, through September, 1990, the defendant tampered with the reports required by the permit and violated the terms of the permit. The allegations all dealt with the concentrations of zinc which were discharged.

The permit in question required Spirol to submit weekly samples of its discharge to an independent laboratory and report these results on a monthly basis to the Connecticut Department of Environmental Protection ("DEP"). The DEP administered the permit pursuant to authority delegated to it from the Environmental Protection Agency. The weekly samples were collected by employees under the supervision of the defendant. The

testimony at trial showed that Spirol maintained an internal method of measuring the level of zinc in the wastewater. The testimony was that employees at Spirol took various steps to alter the sampling process if the in house results were not satisfactory. These steps included discarding the initial sample, diluting the sample with tap water, or using a coffee filter to reduce the zinc level. There was testimony showing varying degrees of knowledge on the part of the defendant as to these steps.

Each month the defendant submitted a report to the Connecticut Department of Environmental Protection that indicated that the levels of zinc did not exceed the permissible amounts specified by the permit. On each report the defendant signed the following statement:

> I certify under penalty of law that this document and all attachments were prepared under by [sic] direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, [sic] the information is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

There was evidence that the defendant was a person of limited educational and professional experience, who had risen to his position as a result of long years with the

same employer. In fact, the government produced evidence that within approximately six weeks of the termination of the defendant, the problem with the zinc discharges had been corrected by the defendant's successor. This fact prompted the trial justice to query the prosecutors if the defendant was being prosecuted for his lack of ability. In a colloquy with the prosecutor, the Court said. "So he's being indicted for not being a good manager, other than being –" Tr. at 148. Shortly thereafter the Court said: "He was inefficient? Is that what you are saying?" Tr. at 148. During that same exchange, the prosecutor said: " . . . our position is that Mr. Hopkins was essentially, through lack of effort, lack of concern, just didn't – rather than fix this –." Tr. at 148. Moreover, the evidence established that the defendant had received no training during the last six years and had limited education. Tr. at 110-111.

The key question in this case was the jury instructions concerning the issue of knowledge. As to Count 1, the Court charged as follows:

> It is not necessary for the government to prove that the Defendant intended to violate the law, or that the Defendant had any specific knowledge of the particular statutory, regulatory or permit requirements imposed under the Clear Water Act. The government must prove beyond a reasonable doubt, however, that the Defendant acted voluntarily or intentionally to falsify, tamper with or render inaccurate a monitoring device or method, and that he did not do so by mistake, accident or other innocent reason.

Tr. at 285-286.

As to Count 2, the Court charged as follows:

> To reiterate, the government need not prove that the Defendant intended to violate the law, or that the Defendant had any specific knowledge of the specific requirements of the conditions and limitations of the permit. The government must prove beyond a reasonable doubt, however, that in taking actions – or causing actions to be taken – in violation of the permit, he acted voluntarily, or intentionally, and not by mistake, accident, ignorance of the facts, or for other innocent reason.

Tr. at 288.

As to Count 3, the conspiracy count, the Court charged:

> While the government must prove that the defendant entered the conspiracy knowingly and willfully, understanding the purpose of the agreement, it need not establish that the defendant acted with a specific intent to violate or disregard the law. Thus, if you are convinced beyond a reasonable doubt that the defendant entered the conspiracy with an understanding that the purpose of the conspiracy was to falsify or tamper with a monitoring device or method, and/or to violate the state discharge permit, it is immaterial whether the defendant knew such acts are unlawful.

Tr. at 293-294.

The defense objected to the definition of knowledge given by the Court and offered alternative definitions of its own. As to Count 1, the defense proffered the following instructions:

> That the defendant knew that the monitoring device or method was required to be maintained under the Clean Water Act and that his actions were in violation of the Clean Water Act.

Tr. at 303.

As to Count 2, the defense offered the following instruction:

> That the defendant knew that he was violating conditions or limitations of a discharge permit and knew that he was acting in violation of the Clean Water Act.

Tr. at 304. In the event this instruction were not given, the defense asked for the following instruction:

> That the defendant knew that he was violating conditions or limitations of discharge permit or causing the same.

App. at 334; Tr. at 304.

As to Count 3, the defense objected specifically to the language of the Court instructing the jury that the government did not have to prove that the defendant acted with a specific intent to violate or disregard the law and that it was immaterial whether the defendant knew his acts were unlawful. App. at 335; Tr. at 305 paraphrasing.

ARGUMENT

A. The Wording of the Statute

The critical question in this case is the level of knowledge required for a violation of two provisions of the

Clean Water Act, 33 U.S.C. section 1319(c)(2)(A) provides criminal penalties for any person who:

> knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 . . . , or any permit condition or limitation implementing any of such sections in a permit . . .

33 U.S.C. section 1319(c)(2)(A). The defense submits that the term "knowingly" requires proof that the defendant had actual knowledge that his conduct violated the law. The first argument advanced by the defendant is that the plain language of the statute compels the conclusion that what is required is that a person actually know he was violating the law. As the Court of Appeals in this case said:

> As a matter of abstract logic, it would seem that a statute making it unlawful to "knowingly violates" a given statutory or permit provision would require proof that the defendant both violated and knew that he violated that provision.

The defense submits that the plain language of the statute requires this result. This is exactly the conclusion reached by Judge Kleinfeld of the Ninth Circuit, when he stated:

> The statute says "knowingly violate(s) . . . any permit condition or limitation." "Knowingly" is an adverb. It modifies the verb "violates." The object of the verb is "any permit condition or limitation." The word "knowingly" is placed before "violates" to explain its meaning in the case at hand more clearly." 1 George O. Curme, A Grammar of the English Language 72 (1935). Congress has distinguished those who knowingly violate permit conditions, and are

> thereby felons, from those who unknowingly violate permit conditions, so are not. The panel reads the statute as though it says "knowingly discharges pollutants." It does not. If we read the statute on the assumption that Congress used the English language in an ordinary way, the state of mind required is knowledge that one is violating a permit condition.

United States v. Weitzenhoff, 35 F.3d 1275, 1294 (9th Cir. 1994), (Kleinfeld, J. Dissenting). The Court of Appeals in this case adopted a different approach. It opined that the Court was required to determine the proper " 'inference of the intent of Congress' ", citing *Staples v. United States*, 114 S.Ct. 1793, 1797 (1994).

Yet the very section of *Staples v. United States* cited by the Court of Appeals is followed by the statement that the starting point in the analysis of the intent of Congress is the wording of the statute itself. *United States v. Staples*, 114 S.Ct. at 1797. Justice Thomas goes on to note that the statute at issue in *Staples* was silent on the issue of the level of mens rea required. *Staples v. United States*, 114 S.Ct. at 1797. Indeed, Justice Thomas goes on to make the point that even silence on the issue of mens rea does not "necessarily suggest that Congress intended to dispense with the conventional mens rea element. . . . " *Staples v. United States*, 114 S.Ct. 1793, 1797 (1994).

This Court has frequently said that the definition of the elements of criminal offenses is a legislative function, particularly in the arena of federal crimes. *Liparaota v. United States*, 471 U.S. 419 (1985). In different words, this Court reiterated that point in *United States v. Staples*, when this Court said the starting point to determine

intent is the language of the statute itself. *Staples v. United States,* 114 S.Ct. at 1796. A court is not to turn to legislative history, " . . . to cloud a statutory text that is clear." *Ratzlaf v. United States,* 114 S.Ct. 655, 662-663 (1994).

Moreover, if the language of the statute is ambiguous, the rule of lenity would require a construction that imposes upon the government the higher burden of proof, to wit that the government prove the defendant knew he was violating the law. *United States v. Weitzenhoff,* 35 F.3d at 1295, (Kleinfeld, J. dissenting), citing *inter alia, Ratzlaf v. United States,* U.S. 114 S.Ct. 655 (1994).

The defense submits that the plain wording of the statute compels the conclusion that the word knowingly as used in the statute requires proof that the defendant knew that he was violating the statute. A juxtaposition of subsections 1 and 2 of 33 U.S.C. section 1319(c) provides further support for the defendant's position. 33 U.S.C. section 1919 is entitled **Enforcement.** Section c is titled **Criminal Penalties.** Subsection (1) is titled **Negligent violations** and Subsection 2 is titled **Knowing violations.** Negligent violations are punishable by a fine and imprisonment for not more than one year for the first violation and double that penalty for second and subsequent violations. Knowing violations are punishable by a fine and imprisonment for not more than 3 years and similarly double those penalties for second and subsequent violations. Clearly these subsections of the statutory scheme show a considered scheme in which more serious penalties are imposed for more serious violations, with the government yet retaining the ability to prosecute

persons for misdemeanor violations without being obligated to show knowledge.

Further consideration of the statutory scheme reinforces this analysis. The opinion of the Court in this case would allow conviction of a person for a felony with less proof of responsibility than for a misdemeanor. A misdemeanor conviction would require proof of negligence, which would require proof of the existence of a duty by the defendant, a standard of care to be observed, and a breach of the same. Conviction of a felony, conversely, would not require any such proof. To impose upon the government a higher standard of proof for violation of a misdemeanor than a felony is to stand the logical construction of a statute on its head. The result simply does not make sense. The only result that allows the construction of the misdemeanor and felony provisions of section 1319 to stand in a logical relation to each other is to read the felony statute as having a mens rea requirement.

Finally, consideration of the Clean Water Act as a whole enhances this analysis. This Act has provisions for the imposition of civil and administrative penalties. 33 U.S.C. section 1319(d), titled Civil Penalties, provides, in relevant part, that:

> [a]ny person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation.

In a similar vein, 33 U.S.C. section 1319(g)(1)(A), is titled "Administrative Penalties" and provides in pertinent part:

> (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title . . . the Administrator . . . may . . . assess a class I civil penalty or a class II civil penalty.

33 U.S.C. Section 1319(g)(1)(A). The imposition of these sanctions does not require a finding of a mens rea. The reading accorded the felony provisions of the Act by the Court of Appeals in this case would obviate any differences in culpability between an administrative or civil penalty on the one hand, and a felony violation on the other hand, while leaving the most heightened burden faced by the government in misdemeanor violations.

B. The Court of Appeals' Reliance on the Public Welfare Doctrine Was Misplaced

1. The Application of the Public Welfare Doctrine to this Case

The Court of Appeals in this case relied on cases involving the "public welfare" in construing the knowledge requirement in this case. Slip Opinion at 10. It cited *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971); *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Dotterweich*, 320 U.S. 277 (1943); and *United States v. Balint*, 258 U.S. 250 (1922). Slip Opinion at

10. In all of these cases, the Court found that Congress did not require proof that a defendant knew his actions were unlawful. In essence the Court was comparing the statutes in these cases with the statute in this case, but the comparison illuminates why strict liability should not be applied in this case. In *International Minerals* what was forbidden was the transport of hazardous materials. In *United States v. Freed,* the item being regulated was hand grenades. In *United States v. Dotterweich,* the subject matter being regulated was adulterated drugs and in *United States v. Balint,* it was narcotics. In each of these cases, the person involved in the handling of the materials is on notice by virtue of the nature of the materials in question. In this case, the breadth of the Clean Water Act extends far beyond materials that are traditionally considered hazardous or dangerous. Indeed, in this case, there was never any evidence of harm to the environment. There were certainly no reports of any fish being killed as a result of the discharge in this case. Tr. of trial at 217. Moreover, the record does not establish that the vast majority of substances regulated by the Clean Water Act are of the nature to alert the ordinary user that they are subject to stringent regulation. Indeed, the breadth of the Act suggests a contrary conclusion. The Act defines a pollutant as:

> "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.

33 U.S.C. section 1362(6). The broad sweep of the statute extends far beyond what is inherently dangerous.

The Court of Appeals in this case said:

> Further, the CWA sections to which section 1319(c)(2)(A) refers regulate a broad range of pollutant discharges, including "[w]ater quality related effluent[s]," *see* 33 U.S.C. section 1312; "toxic pollutants" listed in accordance with section 1317(a), *see* 33 U.S.C. section 1317; "[o]il and hazardous substance[s]," *see* 33 U.S.C. section 1321; and "sewage sludge," *see* 33 U.S.C. section 1345. The vast majority of these substances are of the type that would alert any ordinary user to the likelihood of stringent regulation. Moreover, the very fact that a governmental permit has been issued enhances the user's awareness of the existence of regulation.

Slip Opinion at 13-14.

There are two significant problems with this conclusion of the Court of Appeals. First, the mere fact that there has been regulation, even of an extensive sort, should not be sufficient by itself to trigger the public welfare doctrine. *See Staples v. United States* in which this Court said that the existence of regulation in a particular area is not sufficient by itself to implicate the public welfare doctrine. *United States v. Staples*, 114 S.Ct. at 1801. In *Staples*, the comment was made with respect to guns. If that is true with respect to guns, it should be equally true with respect to issues covered by the Clean Water Act.

The second problem with the statement of the Court of Appeals is the comment that "The vast majority of these substances are of the type that would alert any

ordinary user to the likelihood of stringent regulation." The record simply does not support this very broad statement. Indeed, in this case, there was no evidence of any harm to the environment as a result of the violations which were the basis for the convictions. What was at issue was the discharge of lead in excess of permit levels. The record is totally silent as to any evidence that the nature of this substance was such as to alert an ordinary user about the likelihood of stringent regulation.

The very structure of the Clean Water Act is different than many other types of regulation. It regulates all conduct involving waters and wetlands, except that which is permitted, rather than prohibiting specified conduct. One consequence of such breadth is that the nature of conduct which is subject to the statute is broad and includes much conduct that might generally be considered innocuous. This Court has recently reaffirmed that the public welfare doctrine requires that a person at least know that the person is dealing with something that is inherently dangerous. *Staples v. United States*, 114 S.Ct. at 1798, n. 3. The breadth of the Clean Water Act militates against such an interpretation.

The legislative history also does not support the view adopted by the Court of Appeals in this case. The Court of Appeals focused on the change in the legislation which basically resulted in the substitution of the word "knowingly" for "willfully." Slip Opinion at 14. The panel opinion goes on to cite many instances in which "willfulness" has been defined to require knowledge that one was breaking the law. *See, e.g., Ratzlaf v. United States*, 114 S.Ct. 655 (1994); *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604 (1991). The panel opinion also cites *United States*

v. International Minerals & Chemical Corp., 402 U.S. 558, 564-565, 91 S.Ct. 1697, 1701-1702 (1971) for the proposition that the term "knowingly" does not require proof that a defendant knew his acts were illegal. The panel opinion goes on to comment on the change in wording from "willfully" to "knowingly," stating:

> We infer from this reduction that, by the latter term, Congress intended not to require proof that the defendant knew his conduct violated the law or a regulatory permit.

Slip Opinion at 16.

The defense respectfully submits that the difference in meaning between the terms "willfully" and "knowingly" is not universal or near universal and that often the term "knowing" has signaled a heightened mens rea requirement.

Most recently, this Court has considered the meaning of the term "knowingly" in *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S.Ct. 464 (1994). In its decision, this Court cited cases utilizing the term "knowingly" to impose a heightened mens rea requirement. *United States v. X-Citement Video Inc.*, 115 S.Ct. at 468. Of particular note, the Court cited *Liparota v. United States*, 471 U.S. 419, 433, 105 S.Ct. 2084, 2092 (1985), in which the Supreme Court held that the term "knowingly" modified the phrase "in any manner not authorized by {the statute}." *United States v. X-Citement Video, Inc.*, 115 S.Ct. at 468, citing *Liparota v. United States*.

In *United States v. X-Citement Video, Inc.*, 115 S.Ct. at 472, the Supreme Court held that the term "knowingly" had a broad reach which required the government to

prove knowledge both as to the sexual nature of the material and as to the age of the performers. The defense submits that the inference the panel opinion drew from the change in wording from "willfully" to "knowingly" is not warranted. In fact, the defense submits that the history of the use of the terms shows that the meaning of the two terms is more dependent upon context than a universal definition.

In *United States v. Weitzenhoff*, the dissent from the petition for rehearing and rehearing en banc considered the legislative history of the Clean Water Act. Judge Kleinfeld said:

> Even if the use of legislative history were proper here, it would not support the panel's construction. The legislative history furnished a column of quotations and references in the opinion but no genuine support of the panel's analysis.

United States v. Weitzenhoff, 35 F.3d at 1295 (Kleinfeld, J. Dissenting). The defense submits that in light of the clear language of the statute, there is no need to consider legislative history, but that if the legislative history is considered, it is at most inconclusive.

2. The Public Welfare Doctrine Considered In Light of Applicable Penalties

In *Staples v. United States*, this Court noted that one of the characteristics of the "public welfare" offenses was the fact that they generally provided for only light penalties, including short jail sentences. *Staples v. United States*, ___ U.S. ___, 114 S.Ct. at 1802. In *Staples* this Court said

that the severity of the penalty was a factor to be considered in determining whether or not an offense should be classified as a public welfare offense. *Staples v. United States*, ___ U.S. ___, 114 S.Ct. at 1804. In this case, the significant sanction, a felony conviction, a prison sentence of twenty one months, fines, and supervised release were all imposed. These are very serious sanctions that further militate against application of the public welfare doctrine in this case. This Court declined to adopt a bright line rule in *Staples v. United States* that the public welfare classification of cases should not apply to any felony, but the defense urges that in the context of this case, the severity of the penalty should prevent application of the public welfare doctrine. Alternatively, this Court should adopt precisely the bright line rule it declined to adopt in *United States v. Staples* and simply declare the public welfare doctrine inapplicable to felonies.

C. The Meaning of Knowingly in 33 U.S.C. section 1319(c)(4)

The panel opinion of the Court of Appeals treats the meaning of "knowingly" the same for both substantive counts of the indictment alleging violations of 33 U.S.C. sections 1319(c)(2)(A) and 1319(c)(4). Slip Opinion at 19. The defense agrees that the term should be construed consistently within the Clean Water Act and hence the argument set forth above applies with equal force to both substantive counts, as well as the conspiracy count.

CONCLUSION

For the reasons set forth above, petitioner respectfully urges that this Court grant certiorari to determine whether the actions of the Court of Appeals for the Second Circuit as set forth were in error.

Respectfully submitted,

ROBERT HOPKINS
By his Attorney

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 989 August Term, 1994

(Argued: February 9, 1995 Decided: APR 28 1995)

Docket No. 94-1428

UNITED STATES OF AMERICA,

Appellee,

- v. -

ROBERT H. HOPKINS,

Defendant-Appellant.

Before: OAKES, KEARSE, and CABRANES, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge,* convicting defendant of violating wastewater discharge permit issued pursuant to the Clean Water Act and of falsifying reports required under the permit, 33 U.S.C. §§ 1319(c)(2)(A) and (c)(4), and of conspiring to do so, 18 U.S.C. § 371.

Affirmed.

JOSEPH C. HUTCHISON, Assistant United States Attorney, New Haven, Connecticut (Christopher F. Droney, United States Attorney for the District of Connecticut,

New Haven, Connecticut, on the brief), *for Appellee*.

ROBERT B. MANN, Providence, Rhode Island (Mann & Mitchell, Providence, Rhode Island, on the brief), *for Defendant-Appellant*.

KEARSE, *Circuit Judge*:

Defendant Robert H. Hopkins appeals from a judgment entered in the United States District Court for the District of Connecticut following a jury trial before Ellen Bree Burns, *Judge*, convicting him on one count of falsifying, tampering with, or rendering inaccurate a monitoring device or method required to be maintained pursuant to the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993), in violation of *id.* § 1319(c)(4); one count of violating the restrictions of a discharge permit issued pursuant to the Act, in violation of *id.* § 1319(c)(2)(A); and one count of conspiracy to violate §§ 1319(c)(2)(A) and (c)(4), in violation of 18 U.S.C. § 371 (1988). Hopkins was sentenced principally to 21 months' imprisonment, to be followed by a two-year period of supervised release, and ordered to pay a $7,500 fine. On appeal, he contends that the district court improperly instructed the jury on the knowledge element of the offenses with which he was charged and erred in giving a "conscious avoidance" instruction with respect to the two substantive counts. For the reasons below, we affirm the judgment of conviction.

I. BACKGROUND

The present prosecution focused on environmental problems of Spirol International Corporation ("Spirol"), a manufacturer of metal shims and fasteners in northeastern Connecticut. Spirol's manufacturing operation involved a zinc-based plating process that generated substantial amounts of wastewater containing zinc and other toxic materials; this wastewater was discharged into the nearby Five Mile River. The State of Connecticut's Department of Environmental Protection ("DEP"), pursuant to authority delegated by the United States Environmental Protection Agency, administered the CWA provisions applicable to Spirol's discharges into the river. In 1987, Spirol, then operating under the name "CEM Co.," entered into a consent order with DEP, requiring Spirol to pay a $30,000 fine for past zinc-related discharge violations and to comply in the future with discharge limitations specified in the order. In February 1989, DEP issued a modified "wastewater discharge permit" (the "DEP permit") imposing more restrictive limits on the quantity of zinc and other substances that Spirol was permitted to release into the river.

From at least 1987 through September 6, 1990, Hopkins was Spirol's vice president for manufacturing. Hopkins signed the 1987 consent order with DEP on behalf of Spirol, and he had corporate responsibility for ensuring compliance with the order and the DEP permit. The present prosecution charged that between March 1989 and September 1990 Hopkins deliberately tampered with Spirol's wastewater testing and falsified its reports to DEP. The government's proof at trial included the testimony of Dennis Mark Morrison, Aaron Anderson, and John J.

Morris, who at the pertinent times were Spirol employees. Taken in the light most favorable to the government, the evidence was as follows.

A. The Evidence as to the Sampling Process Directed by Hopkins

The DEP permit required Spirol each week to collect a sample of its wastewater and send it to an independent laboratory by Friday morning of that week. Spirol was required to report the laboratory results to DEP in a discharge monitoring report once a month. Under the DEP permit, the concentrations of zinc in Spirol's wastewater were not to exceed 2.0 milligrams per liter in any weekly sample, nor to average more than one milligram per liter in any month.

During the period March 1989 to September 1990, Spirol began its weekly sampling process on Mondays. A composite sample of the plant's wastewater was aggregated over a 24-hour period by Morrison and Anderson, who were involved in the zinc-plating process. Morrison was Anderson's supervisor and reported directly to Hopkins. Before sending a sample to the independent laboratory, Morrison and Anderson measured the concentration of zinc in the sample, and Morrison reported the results to Hopkins. Morrison and Anderson testified that if the sample collected on a Tuesday contained less than one milligram of zinc per liter, it would be sent promptly to the independent laboratory with a "chain of custody" record signed by Hopkins. If the Tuesday sample was not below that level, however, it was not sent to the laboratory. Morris, Spirol's maintenance engineer, testified that

Hopkins expressed concern that if the samples did "not meet the permit requirements . . . the company would be facing another fine." (Trial Transcript ("Tr.") at 48.) Accordingly, whenever the Tuesday in-house test indicated a zinc content above the one-milligram-per-liter level, Hopkins directed that that sample be discarded and that another 24-hour composite sample be taken on Wednesday. In 54 of the 78 weeks in question, Spirol's samples were sent to the laboratory later than Tuesday.

If a Wednesday sample failed the in-house test, Hopkins sometimes ordered that it too be discarded and that another sample be taken on Thursday; but he more often instructed Morrison and Anderson to dilute the Wednesday sample with tap water or to reduce the zinc concentration using an ordinary coffee filter. Similarly, if the Thursday sample failed to meet the proper standard, Hopkins usually directed that it be diluted or filtered; but, Morrison testified, "A lot of times, we would go right through Friday." (Tr. at 90.) Any Friday sample that failed to meet the standard was always diluted or filtered, in order that a good sample could be sent to the laboratory by the Friday deadline. Morrison testified that in some of the samples submitted to the laboratory, there was more tap water than wastewater.

From March 1989 to September 6, 1990, Hopkins filed with DEP monthly discharge monitoring reports consolidating the weekly test results from the independent laboratory. These reports showed no zinc concentrations above one milligram per liter. On each report, Hopkins signed the following certification:

> I certify under penalty of law that this document and all attachments were prepared under by [*sic*] direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information. [*sic*] The information is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Contrary to Hopkins's certifications of his belief as to truth and accuracy, Morrison testified that Hopkins had caused the samples to be "tampered with" about "40 percent of the time." (Tr. at 115.) Morrison testified that on 25-30 occasions when he reported back to Hopkins that he had finally succeeded in getting a satisfactory sample by means of dilution or filtration, Hopkins responded, "I know nothing, I hear nothing." (Tr. at 116.) Anderson testified that on one occasion in the summer of 1989, he reported directly to Hopkins that an unsatisfactory sample had been collected. Hopkins's response was, " 'See what you could do with it' " (Tr. at 136); when Anderson returned three hours later and reported that the sample was now satisfactory, Hopkins signed the chain-of-custody record without comment, question, or sign of surprise.

Morris testified that he told Hopkins that the testing procedures being used were improper. Regardless of the

test results, Spirol continued to discharge its wastewater into the river.

B. The Trial Court's Instructions as to Knowledge

In December 1993, Hopkins was charge in a three-count indictment alleging (1) that he had knowingly falsified or tampered with Spirol's discharge sampling methods, in violation of 33 U.S.C. § 1319(c)(4) (count one); (2) that he had knowingly violated the conditions of the DEP permit, in violation of 33 U.S.C. § 1319(c)(2)(A) (count two); and (3) that he had conspired to commit those offenses, in violation of 18 U.S.C. § 371.

At trial, the district court instructed the jury as follows, over Hopkins's objections, on the knowledge element of each count. As to count one, the court stated:

> Knowledge may be established by direct or circumstantial evidence. One may not willfully or intentionally remain ignorant of a fact, material or important to his conduct to escape the consequences of criminal law.
>
> If you find beyond a reasonable doubt that the defendant was aware that there was a high probability that employees of Spirol were tampering with a monitoring device or method but he deliberately and consciously avoided confirming this fact so that he could deny knowledge if apprehended, then you may treat this deliberate avoidance of [*sic*] the equivalent of knowledge, unless you find the defendant actually believed that Spirol employees were not tampering with a monitoring device or method.

> A showing of negligence, mistake or even foolishness on the part of the defendant is not enough to support an inference of knowledge.
>
> It is not necessary for the government to prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the particular statutory, regulatory or permit requirements imposed under the Clean Water Act.
>
> The government must prove, beyond a reasonable doubt, however, that the defendant acted voluntarily or intentionally to falsify, tamper with or render inaccurate a monitoring device or method and that he did not do so by mistake, accident or other innocent reason.

(Tr. at 285-86.) The court delivered substantially the same instruction with respect to count two:

> To reiterate, the government need not prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the specific requirements of the conditions and limitations of the permit.
>
> The government must prove, beyond a reasonable doubt, however, that in taking actions or causing actions to be taken, in violation of the permit, he acted voluntarily or intentionally and not by mistake, accident, ignorance of the facts, or for other innocent reason.
>
> The element of acting knowingly may also be satisfied if you find beyond a reasonable doubt . . . that the defendant willfully or intentionally remained ignorant of relevant material facts.

(Tr. at 288.)

With respect to the knowledge element of the conspiracy charged in count three, the court instructed that

> [w]hile the government must prove that the defendant entered the conspiracy knowingly and willfully, understanding the purpose of the agreement, it need not establish that the defendant acted with a specific intent to violate or disregard the law.
>
> Thus, if you are convinced beyond a reasonable doubt that the defendant entered the conspiracy with an understanding that the purpose of the conspiracy was to falsify or tamper with a monitoring device or method, and/or to violate the state discharge permit, it is immaterial whether the defendant knew such acts are unlawful.

(Tr. at 293-94.)

The jury convicted Hopkins on all three counts. He was sentenced as indicated above, and this appeal followed.

II. DISCUSSION

On appeal, Hopkins contends principally that the district court instructed the jury erroneously as to the knowledge element of each count of the indictment. He also contends that, as to the substantive counts, the court should not have given a conscious-avoidance instruction. We reject all of his contentions.

A. The Knowledge Requirements Under the CWA

1. Section 1319(c)(2)(A)

Subsection (2) of § 1319(c), whose violation was alleged in count two of the indictment, establishes criminal penalties, including fines of up to $50,000 per day and imprisonment for up to three years, for "[a]ny person" who, *inter alia*,

> *knowingly violates* section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of [Title 33], or any permit condition or limitation implementing any of such sections in a permit issued under [the CWA] by the Administrator or by a State.

33 U.S.C. § 1319(c)(2)(A) (emphasis added). Hopkins contends that the district court should have instructed the jury that it could not find him guilty of violating this section unless it found that he knew he was acting in violation of the CWA or the DEP permit. We disagree.

Section 1319(c)(2)(A) itself does not expressly state whether the adverb "knowingly" is intended to require proof that the defendant had actual knowledge that his conduct violated any of the statutory provisions that follow the phrase "knowingly violates" or had actual knowledge that his conduct violated a permit condition. As a matter of abstract logic, it would seem that a statute making it unlawful to "knowingly violate[ ]" a given statutory or permit provision would require proof that the defendant both violated and knew that he violated that provision. In defining the mental state required for conviction under a given statute, however, the courts

must seek the proper " 'inference of the intent of Congress,' " *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994) (*"Staples"*) (quoting *United States v. Balint*, 258 U.S. 250, 253 (1922)), and in construing knowledge elements that appear in so-called "public welfare" statutes – *i.e.*, statutes that regulate the use of dangerous or injurious goods or materials – the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful. *See, e.g., United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) (discussed below); *United States v. Freed*, 401 U.S. 601, 607-08 (1971) (conviction under 26 U.S.C. § 5861(d) for possession of unregistered hand grenades did not require knowledge of registration requirement); *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (strict liability under 21 U.S.C. § 331 for distribution of adulterated drugs); *United States v. Balint*, 258 U.S. at 252-54 (strict liability under § 2 of Narcotic Act of December 17, 1914, for sale of narcotics).

In *United States v. International Minerals & Chemical Corp.* (*"International Minerals"*), the Court construed a statute that authorized the Interstate Commerce Commission ("ICC") to promulgate regulations governing the transport of corrosive liquids and imposed criminal penalties on those who "knowingly violate[d] any such regulation," *see* 18 U.S.C. § 834(f) (1970) (repealed 1979). The Court held that the quoted phrase required the government to prove only that the defendant knew the nature of his acts, not that he knew his acts violated an ICC regulation. *See* 402 U.S. at 565. The Court stated that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability

of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* Applying this presumption of awareness, the Court concluded that the phrase "knowingly violate[d] any [ICC] regulation" was meant to be a "shorthand" method of referring to the acts or omissions contemplated by the statute. *Id.* at 560-62. Noting "the general rule that ignorance of the law is no excuse," *id.* at 563, the Court "decline[d] to attribute to Congress the inaccurate view that" use of the word "knowingly" would "require[ ] proof of knowledge of the law, as well as the facts," *id. See also Staples*, 114 S. Ct. at 1805-06 n.3 (Ginsburg, J., concurring) ("The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.' ") (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1990)).

This Court in *United States v. Laughlin*, 10 F.3d 961, 964-67 (2d Cir. 1993) ("*Laughlin*"), *cert. denied*, 114 S. Ct. 1649 (1994), applied the *International Minerals* "presumption of awareness of regulation" in constructing provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993), and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993). RCRA provides for the imposition of criminal penalties against any person who "knowingly treats, stores, or disposes of any hazardous waste identified or listed under [RCRA]" without a permit, 42 U.S.C. § 6928(d)(2). We held that this provision

did not require the government to prove that the defendant knew that the waste he dealt with was identified or listed under RCRA or that he lacked a disposal permit. Rather, we held that the government need prove only that the defendant knew the nature of the hazardous waste matter with which he dealt. *See Laughlin*, 10 F.3d at 966. *Accord United States v. Wagner*, 29 F.3d 264, 265-66 (7th Cir. 1994); *United States v. Dean*, 969 F.2d 187, 191 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *United States v. Hoflin*, 880 F.2d 1033, 1037-38 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990). Similarly, with respect to CERCLA, which requires agency notification of an excess discharge of a hazardous substance by any person in charge of a facility "as soon as he has knowledge of any release (other than a federally permitted release)," 42 U.S.C. § 9603(a), we held that the government was not required to prove that the defendant was aware of the regulatory requirements but only that he was "aware of his acts." *Laughlin*, 10 F.3d at 967.

For several reasons, we view the presumption of awareness of regulation, applied to the ground-pollution offenses in *Laughlin*, to be equally applicable to the phrase "knowingly violates [the specified sections or permit]" in § 1319(c)(2)(A). Congress considered discharges of hazardous waste onto the ground, which are regulated in RCRA, as no less serious than such discharges into water, *see, e.g.*, S. Rep. 99-50, 99th Cong., 1st Sess. 29 (1985) (discussing increase in criminal penalties proposed by 1987 amendments to CWA to parallel existing penalties under "RCRA [to] reflect the commensurately serious nature of the violations to be criminally prosecuted under

the Clean Water Act"). Further, the CWA sections to which § 1319(c)(2)(A) refers regulate a broad range of pollutant discharges, including "[w]ater quality related effluent[s]," *see* 33 U.S.C. § 1312; "toxic pollutants" listed in accordance with § 1317(a), *see* 33 U.S.C. § 1317; "[o]il and hazardous substance[s]," *see* 33 U.S.C. § 1321; and "sewage sludge," *see* 33 U.S.C. § 1345. The vast majority of these substances are of the type that would alert any ordinary user to the likelihood of stringent regulation. Moreover, the very fact that a governmental permit has been issued enhances the user's awareness of the existence of regulation.

The legislative history of § 1319(c)(2)(A) also lends support to the conclusion that, under that section, the government need not prove that the defendant knew his conduct was unlawful. Prior to 1987, the substance of § 1319(c)(2)(A) appeared in § 1319(c)(1), which provided penalties for one who "*willfully* or negligently" violated that section. *See* 33 U.S.C. § 1319(c)(1) (1982) (emphasis added). In 1987, Congress amended § 1319(c)(1), placing the prohibitions against intentional and negligent violations in separate sections, addressing negligent violations in § 1319(c)(1)(A) and intentional violations in § 1319(c)(2)(A); and in § 1319(c)(2)(A), it changed the term "willfully" to "knowingly." Though the congressional reports on the bills leading to the 1987 amendments do not expressly discuss the change from "willfully" to "knowingly," they make clear that one goal of the amendments was to strengthen the criminal sanctions. *See, e.g.*, S. Rep. No. 50, 99th Cong., 1st Sess. 30 (1985) (noting "[s]trong public support" for "[t]he addition and stren[g]thening of criminal sanctions in the Act

for knowing violations"); H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 138 (1986) (amendments intended to establish "increased penalties for . . . criminal violations of the [CWA]"). One way of heightening criminal sanctions is to reduce the *mens rea* element of the prohibited acts, and a change from prohibiting "willful" acts to prohibiting "knowing" acts may be viewed as such a reduction. The term "willfulness" has generally, albeit not uniformly, been interpreted as referring to knowledge that the conduct in question was wrongful or unlawful. *See, e.g., Ratzlaf v. United States,* 114 S. Ct. 655, 657 (1994) (to convict of "wilfully" structuring transactions in violation of 31 U.S.C. § 5322, government must prove that the defendant had knowledge that structuring itself was unlawful); *Cheek v. United States,* 498 U.S. 192, 201 (1991) (willfulness in 26 U.S.C. § 7201, prohibiting federal tax evasion, means the "voluntary, intentional violation of a known legal duty") (internal quotes omitted); *United States v. Pomponio,* 429 U.S. 10, 12 (1976) (per curiam) (same re 26 U.S.C. § 7206(1), prohibiting willful filing of false federal income tax returns); *United States v. Bishop,* 412 U.S. 346, 361 (1973) (same); *United States v. Murdock,* 290 U.S. 389, 396 (1933) (same re 26 U.S.C. § 1265(a), prohibiting willful failure to pay federal tax); *United States v. Gurary,* 860 F.2d 521, 523 (2d Cir. 1988) (same re prosecution under 26 U.S.C. § 7206(2) for willfully aiding and assisting the filing of false federal tax returns), *cert. denied,* 490 U.S. 1035 (1989). *But see United States v. Collins,* 957 F.2d 72, 75-77 (2d Cir.) (inferring, in light of legislative history, that Congress intended "willfully" in 18 U.S.C. § 922(a)(1)(D) (unlicensed dealing in firearms) to mean merely knowingly and purposefully doing an act

that the law forbids), *cert. denied*, 112 S. Ct. 2285 (1992); *United States v. Peltz*, 433 F.2d 48, 54-55 (2d Cir. 1970) (under 15 U.S.C. § 78ff(a), a defendant may be convicted of willfully violating a securities regulation of whose existence he is unaware), *cert. denied*, 401 U.S. 935 (1971).

The prevalent interpretation of "willfully" to mean intentionally violating a law of whose existence the defendant was aware was reflected in *United States v. Murdock*, for example, in which the Supreme Court held that a defendant prosecuted under an Internal Revenue Code provision prohibiting a "willful[]" failure to pay a tax may defend by showing his bona fide misunderstanding of the requirements of that section. *See* 290 U.S. at 396. The *International Minerals* Court, in ruling that "knowingly violates [ICC] regulations" did not require knowledge of the pertinent regulations, pointed out that if Congress had wished to require proof that the defendant knew his acts were unlawful, it could have used the word "willfully" as it had done in the provision construed in *Murdock*. *See International Minerals*, 402 U.S. at 564. We think this observation is especially pertinent where Congress has amended a statutory provision, as it did with respect to § 1319(c)(2)(A), to change the *mens rea* element from "willfully" to "knowingly." We infer from this reduction that, by the latter term, Congress intended not to require proof that the defendant know his conduct violated the law or a regulatory permit.

Thus, we conclude that the purpose and legislative history of § 1319(c)(2)(A) indicate that Congress meant that that section would be violated if the defendant's acts were proscribed, even if the defendant was not aware of the proscription.

The only other Circuit, of which we are aware, to construe the knowledge requirement of § 1319(c)(2)(A) has reached the same conclusion. In *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995), the Ninth Circuit noted that the criminal provisions of the CWA define a set of "public welfare" offenses that are "clearly designed to protect the public at large from the potentially dire consequences of water pollution." *Id.* at 1286 (citing S. Rep. No. 99-50, 99th Cong., 1st Sess. 29 (1985)). The *Weitzenhoff* court upheld the trial court's instruction that, with respect to knowledge, the government was required to prove only that a defendant knew he was discharging the pollutants in question and was "not required to prove that the defendant knew that his act[s] or omissions were unlawful." *Id.* at 1283 (internal quotes omitted). Rejecting the defendants' contention that the government should have to prove their knowledge of the pertinent provisions of their discharge permit, the court concluded that "[t]he *International Minerals* rationale requires that we impute to these parties knowledge of their operating permit." *Id.* at 1285.

Hopkins's reliance on *Staples*, 114 S. Ct. 1793, and on *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1753-54 (1994), for the contrary proposition is misplaced. *Staples* involved 26 U.S.C. § 5861(d) (1988), which prohibits the possession of unregistered machine guns and does not specify a *mens rea* element. The defendant had unsuccessfully requested an instruction that the jury, in order to convict, must find that he knew the weapon he possessed would fire automatically; the court of appeals affirmed his conviction on the ground that the government was not required to prove a defendant's knowledge

of a weapon's physical characteristics. The Supreme Court reversed the conviction, ruling that the defendant could not properly be convicted unless the government proved that he knew the nature of his acts. 114 S. Ct. at 1804. The Court in no way suggested, however, that the government had the burden of proving that the defendant also knew that his acts violated § 5861(d).

Posters 'N' Things also involved prosecution under a statutory provision that contained no express *mens rea* element, to wit, 21 U.S.C. § 857(a)(1) (1988) (repealed 1990), which prohibited "use of . . . [an] interstate conveyance as part of a scheme to sell drug paraphernalia." The Court concluded that the section was intended to require proof of knowledge that the merchandise sold would probably be used with drugs, but not proof of knowledge that the merchandise was within the statutory definition of "drug paraphernalia." 114 S. Ct. at 1753-54.

In sum, we conclude for the foregoing reasons that the trial court correctly instructed the jury that in a prosecution under § 1319(c)(2)(A), the government was required to prove that Hopkins knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit issued to Spirol.

2. The Meaning of "Knowingly" in § 1319(c)(4)

We reach the same conclusion with respect to subsection (4) of § 1319(c), whose violation was alleged in count

one of the indictment. That section provides, in pertinent part, that

> [a]ny person who . . . *knowingly* falsifies, tampers with, or renders inaccurate any monitoring device or method *required to be maintained under this chapter,* shall [be guilty of a felony].

33 U.S.C. § 1319(c)(4) (emphasis added). Though Hopkins contends that the district court should have instructed the jury that it could not find him guilty of violating this section unless he knew that accurate maintenance of the monitoring methods was required by the CWA, a term that appears in several places in the same statute should generally be construed "the same way each time it appears," *Ratzlaf v. United States,* 114 S. Ct. at 660. Accordingly, we reject Hopkins's § 1319(c)(4) challenge for the reasons stated above with respect to the "knowingly" element of § 1319(c)(2)(A).

In light of our rejection of Hopkins's contentions concerning the knowledge requirements of §§ 1319(c)(2)(A) and (c)(4), his similar challenge to the district court's instruction on the conspiracy count is also without merit.

3. The Negligence Contention

Hopkins also contends that the jury, consistent with the trial court's instructions, could have convicted him for conduct that was merely negligent or innocent. In light of the court's actual instructions and the evidence presented, this contention is meritless. With respect to count one, for example, the court instructed, *inter alia,*

that the government was required to prove that Hopkins had a high degree of awareness that the testing process was being tampered with, and prove that he "did not [falsify or tamper with that process] by mistake, accident or other innocent reason" (Tr. at 286), and that "[a] showing of negligence, mistake or even foolishness on the part of the defendant is not enough to support an inference of knowledge" (*id.* at 285). With respect to count two, the court similarly instructed that the government was required to prove the Hopkins had "acted voluntarily or intentionally and not by mistake, accident, ignorance of the facts, or for other innocent reason." (*Id.* at 288.)

Nor did the evidence show conduct that was merely negligent. Rather, the evidence and testimony at trial overwhelmingly indicated both that Hopkins was aware of the permit requirements and that he knew that numerous samples of Spirol's wastewater discharge contained concentrations of zinc in excess of the permitted levels. In his capacity as a corporate officer, Hopkins had signed the 1987 consent order imposing detailed discharge limitations; the February 1989 permit modification had been sent to Spirol to the attention of Hopkins; and Hopkins had sole corporate responsibility for supervising the Spirol wastewater testing program throughout the relevant period. In carrying out that supervision, Hopkins repeatedly warned Morrison when the zinc concentrations in a sample were "close to the borderline," repeatedly sent Morrison back for cleaner samples, and specifically alluded to the one-milligram-per-liter permit limitation by telling Morrison to "make sure it doesn't go over one." (Tr. 100.)

We see no possibility that the jury could have convicted Hopkins solely for negligence.

B. The Conscious-Avoidance Instruction

Hopkins also challenges the district court's instruction that the jury could find that Hopkins had the equivalent of knowledge if it found that "there was a high probability that employees of Spirol were tampering with a monitoring device or method but [Hopkins] deliberately and consciously avoided confirming this fact so that he could deny knowledge if apprehended." Hopkins argues that such an instruction was inappropriate because it was contrary to the government's contention that he had actual knowledge. His challenge has no merit.

A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt "that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact," *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993). *See generally United States v. Civelli*, 883 F.2d 191, 194-95 (2d Cir.), *cert. denied*, 493 U.S. 966 (1989). Such an instruction is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain. *See, e.g., United States v. Mang Sun Wong*, 884 F.2d 1537, 1541 (2d Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990).

Both prerequisites for a conscious-avoidance instruction were present here. Though Hopkins did not testify at trial, his knowledge plainly was in dispute, for the thrust of his cross-examination and arguments was that he did not know about the tampering. For example, in his closing argument, defense counsel argued that Hopkins could have corrected matters "if [he] had known what was going on." (Tr. at 253.) Further, though there was ample evidence that Hopkins himself had ordered the tampering with the samples that were to be sent to the laboratory, there was also evidence that he had studiously avoided confirming the tampering. Morrison testified, for example, that on 25-30 occasions when he presented Hopkins with satisfactory samples after having previously presented him with unsatisfactory samples, Hopkins said, "I know nothing, I hear nothing." In light of Hopkins's litigation position and the evidence at trial, the district court did not err in instructing the jury that it could find Hopkins guilty based upon his conscious attempt to avoid actual knowledge that the samples had been falsified.

CONCLUSION

We have considered all of Hopkins's arguments on this appeal and have found them to be without merit. The judgment of conviction is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of July one thousand nine hundred and ninety-five.

USA

Appellee,

Dkt No: 94-1428

v

Hopkins

Defendant-Appellant.

(Filed July 18, 1995)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Robert Hopkins.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, CLERK
By: Beth J. Meador
Beth J. Meador Date
Administrative Attorney